No. 80-780

IN THE

Supreme Court of the United States

October Term, 1980

ROWAN COMPANIES, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE FOODSERVICE AND LODGING INSTITUTE

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DI CESARE - Printing — 331-4101 — Washington, D.C. 20006

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BRIEF OF *AMICUS CURIAE* THE FOODSERVICE AND LODGING INSTITUTE

The Foodservice and Lodging Institute as *amicus curiae* supports the position of the petitioner, Rowan Companies, Inc., urging reversal of the decision of the United States Court of Appeals for the Fifth Circuit in this action. Since the Foodservice and Lodging Institute is in full agreement with the legal analysis and conclusions expressed by the Rowan Companies in its petition, the *amicus* will herein restrict its comments to presentation of additional factual considerations and an analysis of the issue insofar as that issue impacts upon the restaurant, food service, hotel and motel industries.

INTEREST OF THE AMICUS CURIAE

The Foodservice and Lodging Institute is a trade association incorporated in the District of Columbia. Its thirty-four members are multi-unit, multi-state restaurant, food service, hotel and motel companies. Members and their franchisees operate approximately thirty-eight thousand (38,000) establishments and employ approximately two and one-half million (2,500,000) individuals.

Many member companies, for their own convenience and business purposes set out more fully below, allow employees to eat snacks or meals immediately before, during, or after their work shifts, at no direct charge. The meals are of small value and form only a very small part of the total benefits received by employees, comparable to the benefits of company-supplied uniforms or aesthetically pleasant work environments. Moreover, employees such as cooks must as a part of their work responsibilities sample food as it is prepared. Waitresses and waiters must sample food in order to know how to describe requested items and daily specials to customers.

The Internal Revenue Service has, with respect to some member companies, asserted that the value of employee meals is subject to social security and unemployment taxes. This assertion runs counter to a practical view of such meals based on experience in the restaurant industry, which indicates that the meals are not remuneration for services. It also runs counter to the result which would be reached through a thorough analysis of the situation in light of the definition of wages, as set out clearly and simply by the Court of Claims in *Hotel Conquistador* v. *United States, infra.* Employers in the restaurant and food service industry can draw no practical guidance whatsoever from either

the Treasury Regulations or the appellate opinion herein to be reviewed, and thus seek an opinion from this Court which will prove useful when applied to their particular facts and circumstances.

Reversal of the Fifth Circuit's decision, supported by this *amicus,* would allow refunds of a small part of employment taxes paid, to some employers and to their employees who cannot practicably represent themselves in this matter. More importantly, however, employers would have guidance on future tax collection obligations in this area.

SUMMARY OF THE ARGUMENT

The decision below should be reversed as an improper interpretation of the operative statutory provisions. "Wages" must be construed consistently for social security, unemployment, and withholding tax purposes.

The decision below should be reversed because the holding, affirming the Internal Revenue Service's erroneous assertion of taxability, ignores the criteria which determine taxability by the terms of the statutes and applicable regulations. The determination of "wages" and of "remuneration for employment" requires examination of the employer's purpose in providing the facilities alleged to be wages. Facilities which are not remunerative in nature are not wages.

ARGUMENT

I. SIMILAR WAGE DEFINITIONS SHOULD BE INTERPRETED IN LIKE FASHION ABSENT CONGRESSIONAL INSTRUCTIONS TO THE CONTRARY

At issue in this action is whether the Internal Revenue Code and related Treasury Regulations require payment of social security and unemployment taxes on the value of certain facilities of small value provided by employers for their own convenience and business purposes. Such taxation would be premised on the theory that such facilities are wages paid to employees for purposes of the Federal Insurance Contributions Act, I.R.C. 3101 *et seq.* [hereinafter, "FICA"], and the Federal Unemployment Tax Act, I.R.C. 3301 *et seq.* ["FUTA"], despite the fact that the facilities are admittedly not wages to employees for withholding tax purposes nor income to the employees for federal income tax purposes. The appropriate FICA and FUTA definitions of wages, with emphasis on the operative provisions, are as follows:

> Wages — For purposes of this chapter, the term "wages" means all *remuneration for employment,* including the cash value of all remuneration paid in any medium other than cash; . . .
>
> I.R.C. 3121(a), 3306(b)

The Treasury Department has interpreted this language to mean:

> Ordinarily, facilities or privileges (such as entertainment, medical services, or so-called "courtesy" discounts on purchases), furnished or offered by an employer to his employees generally, are not considered as remuneration

> for employment if such facilities or privileges are *of relatively small value and are offered or furnished by the employer merely as a means of promoting the health, good will, contentment, or efficiency of his employees.* The term "facilities or privileges", however, does not ordinarily include the value of meals or lodging furnished, for example, to restaurant or hotel employees, or to seamen or other employees aboard vessels, since generally these items constitute an appreciable part of the total remuneration of such employees.
>
> Treas. Reg. 31.3121(a)-1(f), 31.3306(b)-1(f)

The Internal Revenue Service concedes that the facilities in issue are not "wages" for federal income tax withholding purposes despite the fact that the language of the withholding section of the Internal Revenue Code, section 3401(a), is virtually identical to the Code sections here in issue.[1] Moreover, since provided "for the convenience of the employer", the facilities furnished (meals and lodging) are not income; I.R.C. 119.

The Fifth Circuit found nothing objectionable in the Internal Revenue Service's inconsistent interpretations of wages for purposes of different parts of the Internal Revenue Code, and further agreed with the Service's construction of the terms of the Code and the appropriate Treasury Regulations as taxing, for social security and unemployment purposes, employers and employees on the value of facilities available to employees in the course of the employer's business as if

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[1]Brief for the United States on Petition for Writ of *Certiorari* at 2, n. 2.

such facilities were wages paid to the employees.

Implicit in the Fifth Circuit's holding are several important concepts: (1) that the employer's purpose in providing the meals was irrelevant; (2) that the facilities were an appreciable part of the total benefits to employees in the course of employment; and (3) that the Code and regulatory provisions cited above were definite enough to justify the imposition of tax liability on an employer who in essence is serving as a surrogate tax collector.

The court below erred in construing the identical terms of the income tax withholding and FICA and FUTA tax "wage" definitions differently. The remedial purpose of social security and unemployment legislation, cited below as in some way justifying such disparate treatment, 624 F.2d at 706, does not justify such a distinction. The court below ignored the fact that its overbroad definition of wages does not in any way effect the remedial purposes of the statute; it merely alters the level of governmental activity in effecting that purpose. While a broad definition obviously produces a larger fund from which benefits may be paid out, it also imposes a greater tax on employees, the intended beneficiaries. It is not for the Internal Revenue Service to enrich the social security trust fund by enlarging the definition of "wages" enacted by Congress. The extent of the basis for both taxes and benefits, and the distribution of available funds among beneficiaries, are legislative decisions. The Fifth Circuit improperly ignored the most definite evidence of legislative itent available, the use of substantially identical language in the FICA, FUTA and income tax withholding sections of the Code. While the Court below is correct in its assertion that the same terms *need not* mean the same thing, the fact that they were enacted nearly

contemporaneously, with extensive definitional language that is substantially identical, re-enacted as parts of the same chapter within a unified code, and are to be administered by the same agency, is strong evidence of identical legislative intent.[2] The converse proposition, that statutory provisions *do not* mean the same thing because they *need* not mean the same, is an obvious *non sequitur*.

II. A CHARACTERIZATION OF FACILITIES AS WAGES WHICH DOES NOT CONSIDER WHETHER THE FACILITIES WERE PROVIDED FOR A NON-REMUNERATIVE PURPOSE IS INVALID

The Fifth Circuit implicitly denied weight in its decision-making to the various factors indicative of the non-remunerative purpose of the facilities in issue. Where "remuneration for employment" is the threshhold determination, the employer's purpose in providing facilities, their value, and their relation to overall benefits received in the course of employment are decisive. The court's finding that the facilities furnished in effect constituted remuneration for employment is incompatible with the fact, conceded by the Internal Revenue Service, that the facilities were provided for the convenience of the employer. The Rowan Companies' alternative to providing such facilities was to provide transportation back to shore each day, at a cost four times that of providing meals and lodging. (The value of that wasteful expenditure would not have been taxed). Similarly, had the Rowan Companies, and its employees themselves, viewed the

[2]Congress stated its intent to use the same "wages" basis for withholding tax purposes as that used for social security tax purposes, in enacting the predecessor of the current withholding provisions. S. Rep. No. 1631, 77th Cong., 2nd Sess. (1942); H.R. Rep. No. 268, 78th Cong., 1st Sess. (1943); S. Rep. No. 221, 78th Cong., 1st Sess. (1943).

meals and lodging provided as a part of remuneration for services, one would expect that employees employed in similar capacities ashore would have received either similar facilities or their equivalent value in cash[3]; yet that was not the case. While the "convenience of the employer" test has not been made dispositive here, as in the context of income, I.R.C. 119, it is one of the crucial factors in a determination of what constitutes "remuneration for employment".

Facilities of significant value provided to employees for the employees' benefit and intended as remuneration for services performed are wages for FICA and FUTA purposes. However, facilities provided to employees which incidentally benefit employees but are demonstrably provided for the employer's convenience and primary benefit (e.g. shorter break periods, uniform control, flexible scheduling, etc.) are not by reasonable construction *remuneration for employment* and therefore are not "wages" to employees. Even the Treasury Regulations on this subject are capable of such a reasonable interpretation, consistent with withholding provisions, in that they provide that non-cash items will not be considered wages,

> . . . if such facilities or privileges are of relatively small value and are offered or furnished by the employer merely as a means of promoting the health, good will, contentment, or efficiency of his employees . . .
>
> Treas. Reg. 31.3121(a)-(1)(f), 31.3306(b)-(1)(f)

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[3]*Cf. Pacific American Fisheries* v. *United States*, 138 F.2d 464, 465 (9th Cir. 1943).

The criteria referenced require an analysis of the purpose of the employer in providing facilities to workers. In fact, each criterion listed relates to the benefit of the *employer* in providing such facilities to his employees. While the court below rejects the notion that any "convenience of the employer" criterion is relevant to FICA and FUTA wage definitions, the Treasury Regulations on point contain criteria such as "worker efficiency" which require that a court ascertain whether or not the employer provided facilities in order to promote worker efficiency or instead whether the facility was provided as "remuneration for employment." The court below, in rejecting any "convenience of the employer" criterion, concluded that the sole criterion for ascertaining whether facilities would constitute wages for FICA and FUTA purposes was a determination of whether they were of "appreciable value". Surprisingly, however, the opinion of the Fifth Circuit does not even make casual reference to the value of the facilities furnished to the Rowan Companies' employees.

III. A WAGE DEFINITION RELYING PRIMARILY ON "VALUE" WOULD GRANT I.R.S. AN UNAUTHORIZED HUNTING LICENSE

By plain implication, the court below was of the opinion that lodging on a ship and three cafeteria-style meals a day, together worth six dollars, given to employees working ten twelve-hours shifts in ten consecutive days sixty miles offshore, were "an appreciable part of the total remuneration" of those employees; and that the meals were, under the court's interpretation, not "offered or furnished by the employer merely as a means of promoting the health, good will, contentment, or efficiency of his employees". While such a result seems inconceivable

when one considers the overwhelming business necessity in providing such facilities, their small value in comparison to employees' wages, and the fact that employees on shore received no such benefits, nevertheless, the court's blind adoption of the Internal Revenue Service's interpretation under the talisman of deference to administrative expertise leads to just that conclusion.

It is apparent that such cursory, imprecise judicial review may result in analogous taxability of any facility or benefit furnished by an employer, even those traditionally not so taxed and certainly not within the contemplation of Congress in enacting the term "wages". Nearly every imaginable condition of employment is of some value or benefit to employees. By allowing the Internal Revenue Service to focus on such value, however incidental or ephemeral, *without due regard for the criteria of "remuneration for employment" and "an appreciable part of remuneration"* both contained within the relevant statutory provisions (and their subsidiary considerations: value of facilities, value of facilities in relation to overall benefits, and employer's purposes in furnishing the facilities), the Fifth Circuit's approach would allow inclusion in wages of the value of a convenient job location, of an office window with a pleasant view, of an air conditioned office, and so on *ad infinitum*. (Such "values" also raise obvious administrative difficulties in valuation, especially where individual tastes are concerned).

Herein lies the crux of the *amicus* Foodservice and Lodging Institute's concern. The method of determining taxability of facilities followed by the Internal Revenue Service (i.e., apparently arbitrary inclusion of facilities in wages under the guise of an

open-ended regulation which has been characterized as a "hunting license", *Hotel Conquistador, infra,* 597 F.2d at 1354) and given the approval of the Fifth Circuit (i.e., through deference to administrative decisions), may lead to taxation of benefits in numerous situations both similar and dissimilar to the circumstances presented herein. Of obvious concern to this *amicus* is the typical restaurateur. While meals provided to employees are of the most pressing concern to the restaurant industry, proper consideration of that type of benefit should be prefaced by mention of facilities not thus far alleged by the Internal Revenue Service to be remunerative, such as reimbursement to employees for maintaining uniforms and the aesthetically pleasant atmosphere of a restaurant. An employer willingly incurs such costs to further his business interests. The incidental benefits to employees, insofar as employees need not incur "wear-and-tear" on their own street clothing and as they have a comfortable, pleasant work environment, are not subject to the taxes here in issue.[4]

The operators of restaurants or food service units, or comparable facilities in connection with the operation of a hotel or motel, allow their employees to partake of the establishment's food and beverage items at no direct charge as a matter of custom, convenience and necessity. Employers are motivated to follow this practice for several reasons. As the amount of food and beverages consumed by employees is negligible in comparison to the volume of such items sold in the course of business, and as the employees typically prepare and serve meals for themselves while not

[4]The Internal Revenue Service has specifically ruled that uniform maintenance allowances are not remuneration for services, in the withholding tax context; Rev. Rul. 72-110, 1972-1 C.B. 24. The Service has never attempted to tax the value of employees' work environments in the context here presented.

performing assigned duties, the incremental cost to the employer is a small price to pay for the resultant good will of employees. The value of the meals received by employees is small and constitutes a negligible part of the total benefits they receive in the course of employment.

An employer attempting to alter the traditional practice would find himself faced with employee discontent (with its attendant inefficiencies due to lower morale and higher employee turnover rates) far outweighing any costs in providing employee meals. Furthermore, some employees such as chefs and cooks must consume food products during the course of their workday in order to be familiar with their work and ensure its consistency and quality; others, such as waiters, waitresses, or counter personnel must be familiar with the menu in order to answer patrons' inquiries and make recommendations of particularly good dishes on a given day. Providing for on-premises employee meals also permits management to schedule variable break periods adjustable according to fluctuations in business throughout the day and to schedule shorter break periods than otherwise possible because employees need not leave and are encouraged to remain on the premises for their meals, and need not take time to change out of and into uniforms where management policy is not to allow uniforms to be worn off the premises. Preservation of these employer prerogatives is critical to a successful restaurant operation. Finally, employee meals are good public relations: what diner would patronize an establishment when the cook and waitress eat elsewhere? From the employees' viewpoint, the food and beverages consumed "on the job" are of small value and a minor benefit in comparison to their cash wages. In fact, a cook or employee in charge of quality control would not regard the ability to consume food on the job as any

benefit at all; sampling food is part of the job. Even where the food consumed by a cook is of some "appreciable value" to the ordinary restaurant patron, it would be absurd to subject food consumed by the chef as part of his job to FICA and FUTA taxes. "Value" is but a part of the issue; a facility of "appreciable value" that is provided to employees for the employer's convenience is simply not "remuneration for employment" as that terminology is used in the FICA and FUTA statutes.

The value of facilities provided, while not dispositive of the FICA and FUTA wage question, is of course relevant. The findings of the Court of Claims in *Hotel Conquistador* v. *United States,* 597 F.2d 1348, (Ct. Cl. 1979), *cert. denied,* 444 U.S. 1032 (1980) involving the issue presently before the Court, are instructive. Food service employees therein received meals each workday worth at most (i.e., in the Internal Revenue Service's estimate) $1.25; this value was approximately 8.3 percent of employees' wages. These meals were provided in order to allow for shorter meal breaks and to preclude the wearing of uniforms off the premises. The court rejected as fictitious the idea that meals were a part of some total package of remuneration offered for services, and the idea that the meals were significant enough to have any effect on the cash wages offered to employees' overall wages and benefits, and the are not wages, 597 F.2d at 1348 *et seq.* (Nichols, J., for the court; Davis, J., concurring in the result).

A comparison to *Pacific American Fisheries* v. *United States,* 138 F.2d 464 (9th Cir. 1943), alleged to conflict with *Conquistador,* highlights the facts relevant to the "wages" determination. The employer was required to furnish board and lodging under the terms of a contract fixing the value of those facilities, and

employees who did not receive such facilities received additional cash wages instead. 138 F.2d at 465. "The value of the lodging and sustenance furnished constituted a very substantial portion of this remuneration." *Ibid.* The facilities were not furnished for the convenience of the employer. *Id.* at 466. Under such facts meals constitute wages.

In advising the Court on this issue the *amicus* can do no better than to commend strongly the method of analysis followed by the Court of Claims in *Hotel Conquistador* v. *United States, supra.* That is, the determination of whether facilities furnished by an employer constitute wages depends on the value of the meals, the value of the meals in relation to the employees' overall wages and benefits, and the employer's purpose in providing the facilities.

IV. EMPLOYERS AS SURROGATE TAX COLLECTORS REQUIRE GUIDANCE

The necessity for express guidance from this Court on this issue cannot be overemphasized. The employer is in the first instance a surrogate tax collector, of both his own and his employees' taxes. Further,

> Because the employer is in a secondary position as to liability for any tax of the employee, it is a matter of obvious concern that, absent further specific congressional action, the employer's obligation to withhold be precise and not speculative.
>
> *Central Illinois Public Service Co. v. United States,* 435 U.S. 21, 31 (1978)

Finally, express guidance as to the method of analysis in the instant action is necessary because the Court's opinion will determine taxability of facilities in literally

innumerable situations in practically every industry in the nation. Affirmance of the decision below would encourage the Internal Revenue Service to expand its activities in investigating the taxability of facilities without foreseeable limit, certainly far beyond the scope implicit in Congress' use of the "intentionally narrow and precise" term, "wages", *Central Illinois,* 435 U.S. at 31. Affirmance would reward the Internal Revenue Service for imprecision in its regulations, and would provide no guidance to employers in factual situations which are not closely analogous to those before the Court.

CONCLUSION

For the foregoing reasons the decision below, that meals and lodging furnished to offshore drilling employees within the factual circumstances set out above constitute wages, should be reversed.

Respectfully submitted,

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March 5, 1981